UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
Nos. 14-1166 and 14-1200

MANORCARE OF KINGSTON PA, LLC,	)
Petitioner	)
v.	)
NATIONAL LABOR RELATIONS BOARD,	)
Respondent	)

PETITIONER'S REPLY TO NATIONAL LABOR RELATIONS BOARD'S RESPONSE TO MOTION FOR ATTORNEY FEES

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A. ManorCare Is The Real Party In Interest.

The Board does not dispute that ManorCare prevailed in the underlying proceeding. Instead, it argues that ManorCare is not the "real party in interest," as the invoices for attorney fees were directed not to ManorCare, but to its parent, HCR ManorCare, Inc. (HCR). (Board Response at 7-10). ManorCare acknowledges that it is a subsidiary of HCR and that HCR would not qualify in its own right as a "party" under the EAJA. However, as discussed below and as established in the attached affidavit of Kathryn Hoops, [Attachment A], ManorCare did "incur" the attorney fees in issue and is indisputably the real party in interest.

ManorCare was the sole respondent in the Board proceeding. As alleged in the General Counsel's complaint and admitted in ManorCare's answer, ManorCare is "a Delaware limited liability company," [which] has been providing skilled nursing and rehabilitation services at its facility at 200 Second Avenue, Kingston, Pennsylvania" and is an "employer" covered by the National Labor Relations Act. (JA 619, 622-623). The events that were the subject of the Board's decision all occurred at the Kingston facility. Similarly, ManorCare is the sole petitioner and cross-respondent in this Court. The mere fact that a corporate party is a subsidiary of a larger corporation does not preclude the actual party from qualifying for fees. The EAJA does not provide for aggregation of assets and employees. *Caremore*,

Inc. v. NLRB, 150 F.3d 628, 630 (6th Cir. 1998); *Texas Food Industry Assoc. v. USDA*, 81 F.3d 578, 582 (5th Cir. 1996). *Tri-State Steel Const. Co. v. Herman*, 164 F.3d 973, 979 (6th Cir. 1999).

To be sure, this Court has held that only those parties who are actually liable for fees may recover such fees. *National Ass'n of Mfrs. v. DOL*, 159 F.3d 597, 603 (D.C. Cir. 1998); *Unification Church v. INS*, 762 F.2d 1077, 1082 (D.C. Cir. 1985). Here, although HCR manages legal services for its subsidiaries, the fees are immediately charged to the financial statement of the subsidiary for whom the services were performed. Consistent with this long-standing practice, the attorney fees at issue were charged to ManorCare's P&L statement as they were incurred and paid. If this Court awards fees, such fees will be credited back to ManorCare's financial statements. Thus, ManorCare has in fact paid the fees and is the real party in interest. Indeed, placing reliance "upon the ability of a parent corporation to advance funds . . . is inconsistent with the basic premise that a corporation is separate from its shareholders." *Tri-State Steel*, 164 F.3d at 979 (citing *Germano-Millgate Tenants Ass'n v. Cisneros*, 855 F. Supp. 233, 235 (N.D. Ill. 1993)).

B. The Board's Position Was Not Substantially Justified.

The Board's primary contention is that its position in the underlying agency action and before this Court was substantially justified. These arguments, however, fly in the face of the merits panel's decision. The Board attempts mightily to

explain away the court's decision, while advancing the identical arguments that were rejected by the merits panel. In so doing, the Board fails to come to grips with the reasons relied upon by the merits panel for denying enforcement to the Board's order. "Although the substantial justification inquiry differs from the merits determination, the court's merits reasoning may be quite relevant to the resolution of the substantial justification question. In some cases, the standard of review on the merits is so close to the reasonableness standard applicable to determining substantial justification that a losing agency is unlikely to be able to show that its position was substantially justified." *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 595 (D.C. Cir. 1996). This is precisely such a case.

Indeed, the standard under which the panel reviewed the Board's decision is largely indistinguishable from the EAJA reasonableness standard. Under the EAJA, the Board's position is deemed "substantially justified" if it has "a reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The merits panel reviewed the Board's decision under the following standard:

> We review the Board's findings under a deferential standard, [citation omitted], but we will reverse the Board's decision if it is not "reasonable and consistent with applicable precedent," [citation omitted]. Here, we apply our usual deferential standard, but find the Board's decision to be irreconcilable with the Board's own precedent. In that circumstance, we have no choice but to reverse.

(Panel Decision at 7).

As seems evident, if the Board's decision had possessed a "reasonable basis in law and fact," the panel would have had no choice but to enforce the Board's order. Only by finding that the Board's decision was unreasonable and inconsistent with the Board's own legal precedent was the panel able to deny enforcement. *See Precision Concrete v. NLRB*, 362 F.3d 847, 851-852 (D.C. Cir. 2004) (Per Curiam) ("Absent some compelling argument for asserting jurisdiction where it has long been held to have none, the Board cannot substantially justify its action"); *Cooper v. U.S. R.R. Retirement Bd.*, 24 F.3d 1414, 1417 (D.C. Cir. 1994) (no substantial justification where merits panel "essentially determined that Board *wholly lacked* a reasonable factual basis for its conclusion").

The Board argues, however, that it faithfully applied the *Westwood Horizons Hotel* legal standard, 270 NLRB 802, 803 (1984), and that this Court and the Board merely "disagreed as to how a reasonable employee would have interpreted the statements made by employees Keating and Davis." (Board Response at 12-13). Later, it argues that its decision "was also entirely consistent with long-standing Board precedent," citing cases that were cited to and considered by the merits panel. (Board Response at 15-17). Finally, the Board concludes that "the Board and the Court disagreed with respect to which line of precedent was most applicable, but at the very least, the Board's position was substantially justified."

(Board Response at 17). These assertions simply cannot be reconciled with the decision of the merits panel:

> On the basis of the Board's own precedent, we determine that the third-party conduct here was sufficiently disruptive to undermine the conditions necessary for a free and fair election. (Panel Decision at 2).
>
> Under the Board's *Westwood Hotel* precedent (on which it relied in issuing its decision here), there are six factors used to determine whether a threat is serious and likely to intimidate voters . . . . Here, the analysis of each of these factors points to an election that fell short of the free and fair standard set out in the Board's precedent. (Panel Decision at 8).
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> Indeed, some of the threatening statements in this case are identical to those in *Westwood Hotel,* where some employees threatened to "beat up" those who did not support the union. *Westwood Hotel*, 270 NLRB at 802. It is clear that in its review of these facts, the Board misapplied its own precedent. (Panel Decision at 8-9).
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> Here again [on the scope of the threats], the facts of this case line up with those in *Westwood Hotel.* In *Westwood Hotel,* two employees threatened to beat up any employee in the unit who did not vote for the union. *Id.* That type of broadly aimed threat was sufficient to damage the free and fair election atmosphere and require a new election. (Panel Decision at 9).
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> The Board insists that any comment relayed with less than stenographic accuracy cannot count as dissemination. But this view is inconsistent with the Board's own precedent. . . . Here, in reaching its conclusion, the Board did not follow its own precedent: the threatening statements were disseminated widely enough to have affected the outcome of the election. (Panel Decision at 9).
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> Moreover, when the Board concluded the threatening statements here were merely jokes, it failed to follow its

> precedent in another way. The Board's test for determining whether a statement constitutes a threat is an objective one. . . . The remarks were threatening, and seriously so. The objective standard demanded by the Board's own precedent requires assessing the threats according to what they reasonably conveyed, not what the speakers intended to convey. (Panel Decision at 11-12).
>
> The Board did not even acknowledge this precedent [regarding dissemination to a determinative number of voters], let alone distinguish it. The threatening statements Keating and Davis made were addressed and disseminated to enough employees to sway the outcome of the election. (Panel Decision at 12-13).

The panel's decision thoroughly rejected the Board's analysis, both on the facts and the law. Merely reciting the proper legal standard is not sufficient when the Board fails to actually apply that standard and deviates from its own precedent. This is the essence of an absence of substantial justification, and this Court has repeatedly emphasized that an agency is likely to have difficulty demonstrating that its decision is substantially justified when it (1) engages in disparate treatment of similarly situated parties, or (2) fails to "apply a rule in a situation to which the rule obviously pertains." *LePage's 2000, Inc. v. Postal Regulatory Comm.,* 674 F.3d 862, 866 (D.C. Cir. 2012) (citing *FEC v. Rose,* 806 F.2d 1081, 1089 (D.C. Cir. 1986). Contrary to the Board's assertion, (Board Response at 19), that is precisely what the merits panel concluded that the Board did in this case. The Board treated ManorCare's case inconsistently with the manner in which it

historically treated similar cases, and it correctly stated, but wholly failed to apply, the *Westwood Horizons Hotel* analysis.

The Board attempts to characterize the merits panel's decision as being based on "the Board's mere failure to fully explain its reasoning, or to discuss all the *Westwood Horizons* factors," (Board Response at 12) and other analytical "shortcomings"—the Board "cursorily acknowledged its own precedent" and offered a "discussion too brief to demonstrate how the facts of this case align with the Board's precedent." (Board Response at 18, quoting panel decision at 11). The panel certainly found the Board's analysis lacking, but that is not the essence of the panel decision and certainly not the basis for the denial of enforcement. If the problems in the Board's decision were merely those of analytical omission, the court would have been required to remand to the Board to permit it to provide the requisite analysis. *See, e.g., Daily News of Los Angeles v. NLRB*, 979 F.2d 1571, 1572-73, 1578 (D.C. Cir. 1992); *Lima v. NLRB*, 819 F.2d 300, 303 (D.C. Cir. 1987). The panel did not follow that course; rather, it denied enforcement outright, essentially finding that the Board's decision on the law and the facts was unreasonable and not capable of being reconciled with the established legal precedents. This is equivalent to a finding that the Board's decision and its arguments in this Court lacked a reasonable basis both in fact and in law.

Finally, the Board places reliance on the concurring opinion of Judge Srinivasan, who would have remanded to permit the Board to attempt to reconcile its decision with prior decisions. (Board Response at 18-19). While Judge Srinivasan's concurrence must be considered in the analysis, it falls far short of carrying the Board's burden of proof. This is not a case in which one member of the panel dissented as to the appropriate legal standard or even as to whether the established facts supported the agency's decision. Judge Srinivasan agreed that the Board "failed to note or contend with its prior decisions," failed to "apply the *Westwood Horizons Hotel* factors to the facts of this case," and "made no effort in its analysis to address the closeness of the election." (Concurrence at 3). He further noted that it was not the role of the court to supply post hoc justifications for the Board. *Id.* Thus, there was no dispute among the panel members that the Board's decision should be denied enforcement.

If mere disagreement among the merits panel judges as to whether the agency should be given a second chance to justify its decision were sufficient to establish that the agency was substantially justified under the EAJA, the authoritative impact of the actual panel decision would be severely diminished, and the agency would escape liability for attorney fees without ever actually proving that it was substantially justified. Because this Court did not remand, the case is concluded and there will not be any supplemental decision by the Board for this

Court to review. To deny attorney fees in this instance simply because one member of the merits panel believed that one could conceive of possible justifications for the Board's decision would permit mere speculation to qualify as evidence sufficient to carry the Board's affirmative burden of proof. In essence, the concurring opinion would trump the majority opinion for purposes of awarding attorney fees. ManorCare is unaware of any legal authority that would support such a proposition.

CONCLUSION

The Board does not contest the reasonableness of the fees requested. ManorCare respectfully requests that this Court grant its motion and award ManorCare attorney fees in the amount of $20,169.40.

Dated this 12th day of July 2016.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2016, I electronically filed the foregoing REPLY with the Clerk of Court for the United States Court of Appeals for the D.C. Circuit using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Charles P. Roberts III